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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 786

CAPITOL AIRWAYS, INC., *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, *Respondent*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY OF CAPITOL AIRWAYS, INC. TO BRIEF OF DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 26, 1960.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Capitol Airways, Inc., respectfully submits this Reply to the Brief of Delta Air Lines, Inc., in Opposition to the Petition of Capitol Airways, Inc., for a Writ of Certiorari. This Reply is filed pursuant to Rule 24 and was not heretofore submitted to the

Court because at the time your Petitioner filed its original reply (April 15, 1960), Delta Air Lines, Inc. had not filed a motion to become a party to this proceeding. Delta's motion was dated April 19, 1960, and presumably will be granted by this honorable Court.

ARGUMENT

There is one point raised by Delta which requires correction and clarification. This is Delta's assertion (Brief, p. 3) that it has been providing day-coach service over the Chicago-Miami route at a yield of 4.716¢ per revenue passenger mile and night-coach service over this route at a yield of 4.188¢ per revenue passenger mile. Since your Petitioner, Capitol Airways, proposed a basic fare of 4.0¢ per revenue passenger mile, Delta argues that the proposal of your Petitioner was not substantially different from the existing service being offered by Delta and, therefore, it was sufficient for the Civil Aeronautics Board to make comparative findings regarding the various applicants as opposed to specific findings regarding your Petitioner's proposal.

The basic fallacy in Delta's argument is that Delta uses its *yield* per revenue passenger mile as a comparison with your Petitioner's *proposed fares* per revenue passenger mile. The yield which Delta (or your Petitioner) would receive is substantially less than the actual published fares for the reason that the yield takes into consideration round-trip discounts, family fare-plan reductions, agents' commissions and similar factors, all of which tend to reduce the fare on a per revenue mile basis.

The only equitable method of conforming fares is to use the same basis for comparison for both carriers.

The fact is that your Petitioner proposed a basic fare of 4.0¢ per revenue passenger mile over the long-haul routes to be served (*e.g.*, Chicago-Miami; Detroit-Miami) and a slightly higher fare over some of the short-haul routes. Taking the entire system into consideration, your Petitioner proposed a fare of 4.10¢ per revenue passenger mile.

At the hearing your Petitioner introduced an exhibit (Capitol Exhibit No. 38) listing all of the existing fares (first class, day-coach and night-coach), both in total dollars and in cents per mile, between all possible combinations of points proposed to be served by Petitioner. This exhibit showed that at the time of the hearing before the Civil Aeronautices Board, the existing carriers serving the Great Lakes-Florida area charged an average fare of 5.55¢ per revenue passenger mile. Your Petitioner's proposed fare of 4.10¢ per revenue passenger mile was therefore, 26.1 percent less than the existing fares. However, since the greatest savings would be realized by the first class passengers (which constitute the majority of travelers in the markets at issue), your Petitioner estimated that its average passenger would save 37.8 percent of the fare that would otherwise have been charged.

The type of service proposed by your Petitioner was novel and substantially different from the existing services offered by Delta and other large airlines serving the area involved. This difference was so pronounced that it was not a matter of degree, but a matter of the character of the service offered. Indeed, this fact is clearly recognized in the opinion of the Civil Aeronautics Board. Thus the Board states (J.A., 1331a), as follows:

"Capitol Airways has proposed a *novel* 4¢ per mile fare coach-service between Chicago and Miami and Detroit and Miami." (Emphasis supplied)

Under the circumstances, therefore, the Civil Aeronautics Board was required to make specific findings regarding the service proposed by your Petitioner. It was not sufficient for the Board to find merely that they preferred to grant the application of Northwest Airlines and Delta Air Lines in preference to the application of your Petitioner.

CONCLUSION

For the reasons recited the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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April 26, 1960.

PROOF OF SERVICE

I, Coates Lear, attorney for Capitol Airways, Inc., Petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on April 26, 1960, I served a copy of the foregoing Reply upon the persons listed below, by mailing copies, in duly addressed envelopes, with first-class postage prepaid, as follows:

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